Supreme Court, U.S.
FILED

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No. _____

In The

# Supreme Court of the United States

C. DAVID MORRISON,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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41 pg

## QUESTIONS PRESENTED

1. Whether evidence of excuse or justification is relevant in determining whether an individual "willfully failed" to meet his obligations under 26 U.S.C. § 7202 and other criminal tax statutes.

2. Whether the trial court abused its discretion by refusing to accept the petitioner's conditional plea of guilty for lack of a factual basis, even though the petitioner had admitted to all of the elements of the crime, as the court itself had defined them.

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## OPINION BELOW

The Fourth Circuit Court of Appeals did not select its opinion for publication in the Federal Reporter. The decision is reported at 32 Fed Appx. 669 (2002). The District Court did not publish an opinion in this case. Its pertinent rulings from the bench are reprinted in the Appendix at 11-17.

## JURISDICTION

The Fourth Circuit filed its decision on February 7, 2002, and entered an order denying petitioner's motion for rehearing on March 12, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

## STATUTORY PROVISION INVOLVED

26 U.S.C. § 7202

Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

## STATEMENT OF FACTS

The petitioner, C. David Morrison, was indicted in the United States District Court for the Southern District of West Virginia on two counts of violating 26 U.S.C. § 7202 for willful failure to pay over taxes and on twenty-one other counts involving violations of 18 U.S.C. §§ 2, 371, 666, 1014, 1956, and 1957. The District Court conducted a jury trial, which resulted in guilty verdicts on all counts.

From 1970 through the end of 1998, Mr. Morrison was the chief executive officer of the nonprofit Logan Medical Foundation, which operated Logan General Hospital in Logan, West Virginia. In the early 1990's, Morrison also assumed the position of CEO for Monterra Health Systems, Inc., a newly formed nonprofit corporation that became the parent corporation for both Logan General Hospital and another local hospital. The Monterra Board later formed Monterra Development Corporation (MDC) as a for-profit subsidiary to pursue business ventures in the community and made Morrison CEO of that corporation, as well. MDC's most notable ventures included construction of housing and of a Wal-Mart shopping mall, which was to become the first significant mall in southwestern West Virginia, a corner of the State with severely depressed economic conditions. To finance the construction of the mall, MDC borrowed heavily from, and on the guarantee of, Logan General Hospital. From early in 1995 through 1997, Logan General loaned Monterra Development Corporation approximately $24 million, which nearly depleted the Hospital's assets.[1] Petitioner spearheaded

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[1] The corporate structure under the umbrella of Monterra Health System and the resulting leveraging of Logan Medical Foundation's assets (as part of Monterra Health System) were implemented by the

(Continued on following page)

these various strategies; he and the corporate boards planned to use the anticipated profits from the operation of the mall when it was completed to invest in projects to improve the quality of life in Logan County, to ensure the availability of quality medical care for the community, and (relatedly) to offset growing losses at the Hospital.

By 1997, increased costs in healthcare delivery and mounting losses on Medicare reimbursements ($3 million that year alone) had combined to create a fiscal crisis for Logan General. The mall was not yet ready to open, although it was nearing completion, when significant obligations on the mall construction came due in the second half of 1997. To avoid losing the mall project, diminishing medical services for the citizens of Logan County, or laying off employees, Morrison used hospital funds to make the payments needed to sustain the mall project and to meet certain other financial demands critical to the hospital's operation. As a consequence, Logan General paid only about $41,000 of the approximately $3.3 million that it owed in payroll taxes for the third quarter of 1997. It paid $1.7 million of its fourth quarter taxes but still fell $1.2 million dollars short of the amount due. Those failures formed the basis for the two counts of violating § 7202 for which the petitioner was later indicted. In both quarters, the Hospital filed complete and accurate reports.

For his defense against the charges, the petitioner had intended to adduce evidence to show that the Hospital had

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Foundation's Board upon the specific advice and direction of an expert consultant from Pittsburgh.

these competing demands, that outstanding debts threatened the ability of the Hospital to continue to operate, and that the mall project and the future of the hospital and the community were all at risk if those obligations were not satisfied. These facts, Morrison would show, compelled him to meet the other commitments before the payroll taxes, which he planned to pay after the mall was operational and the fiscal crisis passed. Petitioner thus planned to establish that his failure to pay the taxes was not willful within the meaning of § 7202 because he believed that he had no real choice, that the competing demands on the money deprived him of any real "voluntariness" in the matter.

Shortly before trial, however, the government filed a motion *in limine* to prevent the plaintiff from introducing evidence that would develop "improper defenses on the issue of intent." The district court, on the first day of the trial, granted the motion, ruling from the bench that the definition of willful in *United States v. Pomponio*, 429 U.S. 10 (1976) (*per curiam*), as the "voluntary, intentional violation of a known legal duty" supported the government's position. App. 8. According to the court, "the matter which defendant Morrison would propose to offer as an excuse for paying these moneys out to others than the government, such as a commitment not to lay off employees, such as the chart shows that the Logan Medical Foundation was strapped for money, and as the charts also show that the hospital had to make up for massive revenue losses, that is not admissible as a basis for excusing the failure to pay in this instance. This is a crime that requires proof of intent, and the court has already stated it at the outset drawing on the language in the Pomponio case." Appendix (hereafter "App.") at 8-9. The court thus

rejected the argument of petitioner's counsel that Morrison's "payment of these various invoices was, in essence, not voluntary, that he had no choice but to pay these other bills," App. 9, and specifically barred the petitioner from using as demonstrative exhibits two charts, one entitled "Southern West Virginia Health Care: What Was the Plan?", and another captioned, "The Tax Counts: Why Weren't They Paid?".

Having been stripped of his defense at the very outset of trial, petitioner then entered into negotiations with the United States Attorney and ultimately agreed to enter a conditional guilty plea to the two § 7202 counts in exchange for the withdrawal of the remaining twenty-one counts. The condition on the plea was that it was contingent on appellate court affirmance of the district court's ruling on the government's motion *in limine* and the court's interpretation of § 7202. At the plea hearing, however, the following exchange occurred between the district court and Mr. Morrison:

> [The Court]: Do I understand you to say that by indicating that you chose to pay other bills of your employer, that you were aware that there was an obligation to pay those taxes withheld, both income taxes and FICA taxes, to the Internal Revenue Service?
>
> A. Yes, sir.
>
> Q. And that was for the third quarter of the year 1997 –
>
> A. Yes, sir.
>
> Q. – in the approximate amount of 3.3 million dollars?

A. Yes, sir.

Q. And for the fourth quarter of 1997 in the approximate amount I believe of 1.2 million dollars?

A. Yes, sir.

Q. Now then, do I understand you to say as well that you were aware of your duty to pay those taxes so withheld for those two quarters in those amounts over to the Internal Revenue Service?

A. Yes, sir.

* * *

Q. Now then, do I understand you to say then that you did voluntarily choose not to pay the Internal Service the taxes for each the third and fourth quarters of 1997 that we talked about?

A. Yes, sir.

Q. And do I understand you to say as well that that was on your part an intentional violation of a known legal duty to pay those taxes to the United States?

A. Yes, sir, as the court has defined the law, I realize that.

Q. Well, you can tell me. You knew you had the duty under the law to make the payment over, did you?

A. Yes, sir.

Q. And you chose not to do so?

A. Yes, sir.

> Q. And in doing so, you specifically intended to violate the law?
>
> A. No, sir.
>
> THE COURT: Then if you did not specifically intend to violate the law, the court will not accept the plea.

App. 12-13. Counsel for the United States and petitioner explained that the petitioner had admitted to the elements of the crime, as the court had defined them, and that petitioner wanted to preserve the defense of justification or excuse, which could be inconsistent with an admission that he had "specifically intended to violate the law." App. 14-16. Nevertheless, the court refused to accept the guilty plea, apparently believing that petitioner's admissions were not sufficient to provide a factual basis for the plea. App. 13, 16.

The Fourth Circuit Court of Appeals affirmed the district court's rulings on both the interpretation of § 7202 and the refusal to accept the guilty plea. The court held that the willfulness described by this Court in *Cheek v. United States*, 498 U.S. 192, 201 (1991), and *United States v. Bishop*, 412 U.S. 346, 360 (1973), required the government to prove "nothing more than the intentional violation of a known legal duty." App. 5. The court further concluded that the district court had not abused its discretion in rejecting the plea; rather, that court "was simply . . . attempting to satisfy itself that there was a sufficient basis for the plea." App. 6.

## REASONS FOR GRANTING THE PETITION

### I. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS - AND THE DISAGREEMENT BETWEEN SOME CIRCUITS AND CONGRESS - AS TO WHETHER MITIGATING EVIDENCE ABOUT COMPETING FINANCIAL DEMANDS AND ABILITY TO PAY ARE RELEVANT TO DEFEAT THE WILLFULNESS ELEMENT IN THE FEDERAL CRIMINAL TAX STATUTES.

In *United States v. Bishop*, 412 U.S. 346 (1973), this Court held that "willfully" fails to meet a tax obligation in the criminal tax statutes, 26 U.S.C. §§ 7201-7207, "connotes a voluntary, intentional violation of a known legal duty," 412 U.S. at 360, and that the determination of willfulness requires proof of "evil motive and want of justification in view of all the financial circumstances of the taxpayer." *Id.*, *quoting Spies v. United States*, 317 U.S. 492 (1943).[2] Subsequently, *United States v. Pomponio*, 429 U.S. 10 (1976) (*per curiam*), clarified that "evil motive" or "bad purpose" was established by proof of a "voluntary,

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[2] Earlier in its opinion, the Court quoted more extensively from that passage in *Spies*:

> Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no willful failure to disclose the liability, is intended to constitute a criminal defense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer.

*Spies*, 317 U.S. at 497-98.

intentional violation of a known legal duty" and did not require any further proof of bad faith. *Accord*, *Cheek v. United States*, 498 U.S. 192 (1991).

Since *Bishop* and *Pomponio*, the courts of appeals have split on the question of whether a taxpayer's failure to pay can be "voluntary [and] intentional" if he lacked the funds to pay or if competing financial demands made payment impractical. In 1975 – post *Bishop* – the Ninth Circuit held in *United States v. Poll*, 521 F.2d 329 (9th Cir. 1975),[3] "that the defendant's offer of proof regarding the liquid resources of the corporation and his intention to make up the deficiencies later was relevant and admissible in his effort to refute the willfulness of the failure to pay over." *Id.* at 332. The court insisted that, "to establish willfulness, the Government must establish beyond a reasonable doubt that at the time payment was due the taxpayer possessed sufficient funds to enable him to meet his obligation or that the lack of sufficient funds on such date was created by (or was the result of) a voluntary and intentional act without justification in view of all the financial circumstances of the taxpayer." *Id.* at 333. (Morrison's rejected evidence in this case was similar to that of the defendant's offer of proof in *Poll*.) *See also United States v. Andros*, 484 F.2d 531, 533 (9th Cir. 1973) (financial circumstances of the accused are relevant in determining whether the failure to pay taxes is willful).

Courts in other circuits have reached similar conclusions regarding the meaning of willfulness in the tax laws. *See United States v. Pinner*, 561 F.2d 1203 (5th Cir. 1977)

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[3] This Court denied certiorari in *Poll*, 429 U.S. 977 (1976), less than two months after issuing its decision in *Pomponio*.

(taxpayer's circumstances and his reasons for failing to file returns are relevant to willfulness determination); *United States v. Martin*, 507 F.2d 428, 430 (7th Cir. 1974) (taxpayers reasons for failing to file returns are relevant to willfulness determination); *United States v. Rosenfield*, 469 F.2d 598 (3rd Cir. 1972) (same); *United States v. Harper*, 397 F. Supp. 983, 990 (E.D. Pa. 1975) ("admissibility of evidence of a defendant's income and assets or other indicia of his ability to pay a tax to show that his failure to pay that tax was willful has long been recognized by the courts"); *United States v. Goodman*, 190 F. Supp. 847, 854-56 (N.D. Ill. 1961) (defendant's "financial whirlpool of ever-increasing debt" relevant to willfulness issue; "there is no requirement that a person must borrow money or agree to an assignment of his fees in order to pay his income tax liabilities, nor is there any requirement that a person prefer the government as a creditor").

In addition to the foregoing cases, Congress has recently relied on the *Poll* interpretation of willfulness in enacting the Child Support Recovery Act of 1992 (CSRA), 18 U.S.C. § 228, which uses precisely the same language – "willfully fails" to meet a duty – in criminalizing a failure to pay a "past due [child] support obligation"[4] as the tax code does for its criminal enforcement provisions, 26 U.S.C. §§ 7201-7207. As the First Circuit observed, "The legislative history tells us that Congress borrowed the 'willfully fails to pay' standard from the tax statutes, and that it should be interpreted 'in the same manner that

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[4] A "past due support obligation" under the Act is any amount determined under a state court or administrative child support order that has remained unpaid for more than one year or is greater than $5,000.

Federal courts have interpreted these felony tax provisions.'" *United States v. Smith*, 278 F.3d 33, 37 (1st Cir. 2002). That legislative history includes the following explanation:

> The operative language establishing the requisite intent under [the CSRA] is "willfully fails to pay." This language has been borrowed from the tax statutes that make willful failure to collect or pay taxes a Federal crime, 26 U.S.C. §§ 7202, 7203. Thus, the willful failure standard of [the CSRA] should be interpreted in the same manner that Federal courts have interpreted these felony tax provisions. In order to establish willfulness under those provisions, the government must establish, beyond a reasonable doubt, that at the time payment was due the taxpayer possessed sufficient funds to enable him to meet his obligation or that the lack of sufficient funds on such date was created by (or was the result of) a voluntary and intentional act without justification in view of all of the financial circumstances of the taxpayer. *U.S. v. Poll*, 521 F.2d 329, 333 (9th Cir. 1975). . . . The Committee intends that the willful failure standard of [the CSRA] be given similar effect as the willful failure standard contained in these tax felony provisions.

H.R. Rep. No. 771, 102d Cong., 2d Sess. (1992); *see also* 138 Cong. Rec. S17131. Not surprisingly, courts applying the CSRA and reaching the issue have concluded that the *Poll* standard controls and that defendants may adduce evidence about their financial circumstances and competing commitments to prove that their failure to pay was not willful. *Smith*, 278 F.3d at 37; *United States v. Mattice*, 186 F.2d 219, 228 (2nd Cir. 1999); *United States v. Mathes*, 151 F.3d 251, 253 (5th Cir. 1998); *United States v. Ballek*,

170 F.3d 871, 874 (9th Cir. 1999); *United States v. Williams*, 121 F.3d 615, 621 (11th Cir. 1997); *United States v. Satterly*, 36 F. Supp. 2d 71, 76 (D. Conn. 1998); *United States v. Lewis*, 936 F. Supp. 2d 1093, 1102 (D.R.I. 1996); *United States v. Holbrook*, 15 F. Supp. 2d 10, 18 (D.C.D.C. 1998).

The *Poll* line of cases rests on a reasonable reading of the statute and on the further notion that, while it might be one thing to hold a person economically accountable for their tax (or child support) obligations and to impose civil penalties, it is quite another to send him or her to prison when exigent circumstances have prevented the person from having the capacity to exercise free will. When, as in this case, the taxpayer timely and accurately reported his company's obligations, made payments to the extent he believed feasible in light of all of the corporate and community concerns, fully intended to pay the taxes when he could, and accepted that there would be interest and perhaps civil penalties, imposing a prison sentence (of eight years!) is inconsistent with a fair system of taxation. As this Court explained in *Spies*, "We would expect willfulness in [the criminal tax laws] to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer." 317 U.S. at 498.

Despite that sensible interpretation of willfulness, another line of federal decisions has refused to consider or permit evidence on any defense that resembles mitigation, justification, or explanation for failure to pay. In the leading case (post-*Pomponio*, at least) espousing this view, the Fifth Circuit in *United States v. Tucker*, 686 F.2d 230 (5th Cir. 1982), held that "financial ability to pay the tax when it comes due is not a prerequisite to criminal liability under § 7203. Otherwise, a recalcitrant taxpayer could

simply dissipate his liquid assets at or near the time when his taxes come due and thereby evade criminal liability." *Id.* at 233.[5]

Subsequently, when the Sixth Circuit in *United States v. Ausmus*, 774 F.2d 722 (6th Cir. 1985), confronted the conflict between the Ninth Circuit's and the Fifth Circuit's definitions of willfulness, that court chose the latter's and upheld a jury instruction that read:

> [E]very United States citizen has an obligation to pay his income tax when it comes due. A taxpayer is obligated to conduct his financial affairs in such a way that he has cash available to satisfy his tax obligations on time. As a general rule, financial inability to pay the tax when it comes due is not a defense to criminal liability for willfully failing to pay income taxes.

*Id.* at 724. *See also United States v. McGill*, 964 F.2d 222, 238 n.30 (3rd Cir. 1992) (noting the split of authorities on inability to pay as relevant to determine willfulness but finding it unnecessary to resolve the issue); *United States v. Lewis*, 671 F.2d 1025, 1028-29 (7th Cir. 1982) (defendant not entitled to an inability to pay instruction, even if the law recognizes its validity, because defendant paid other and larger expenses of his business instead of the taxes). By virtue of the panel's rejection of petitioner's appeal in this case, the Fourth Circuit has presumably joined the *Tucker/Ausmus* line of authority.

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[5] The court's reasoning is not terribly convincing: if a taxpayer dissipates his liquid assets at or near when his taxes are due in order to avoid paying taxes, the evidence of willfulness, under any standard, would be palpable.

The willfulness concept pervades the criminal tax statutes. It continues to present interpretive problems for the circuits and has created an obvious and dramatic rift among the lower courts regarding a taxpayer's ability to justify or explain his failure to pay. This Court needs to eliminate that rift and to correct the overreaching application of the criminal law to individuals who act without evil intent, who are victims of extenuating circumstances, and who have dealt honestly with the government. This petition affords the Court the opportunity to meet that need.

## II. THE DISTRICT COURT ABUSED ITS DISCRETION BY REFUSING TO ACCEPT PETITIONER'S GUILTY PLEA, AND THE FOURTH CIRCUIT'S DECISION TO AFFIRM PUTS IT IN CONFLICT WITH THE CIRCUIT COURT FOR THE DISTRICT OF COLUMBIA AND WITH RELEVANT DECISIONS OF THIS COURT.

Petitioner recognizes that a defendant has "no absolute right to have a guilty plea accepted" and that a trial court can "reject a plea in exercise of sound judicial discretion." *Santobello v. New York*, 404 U.S. 257, 262 (1971). Appellate review of a refusal to accept a plea is, accordingly, limited to determining whether the trial court abused its discretion. *Id.* If that standard is to have any meaning, it must be invoked in this case to overturn the district court's arbitrary and, one might say, peevishly asserted refusal to accept petitioner's conditional guilty plea.

As noted above, the trial court informed the parties on the first day of trial that it interpreted 26 U.S.C. § 7202 to require the government to prove only that the defendant

knew that he had to pay the taxes, that the payroll taxes had been collected and were on hand, and that he consciously decided not to pay the amount due. The court further ruled that defendant could not defeat the willfulness element by explaining why he did not pay the taxes; whether he had justification or mitigating reasons was irrelevant, the court said. Upon learning that his entire defense had been barred, petitioner then negotiated the conditional plea. He would plead guilty to the tax counts but reserve the right to appeal the court's ruling on the definition of willfulness.

At the plea hearing, petitioner admitted to the court that he knew he had the obligation to pay the taxes, that he voluntarily chose not to pay the taxes, and that the failure to pay was an intentional violation of a known legal duty, as the court had defined those terms. App. 12-13. When asked, however, whether he "specifically intended to violate the law," petitioner said "no" and the court abruptly announced it could not accept the plea. The court did so, it said, because the plea lacked a factual basis. This is truly astounding. The court defined the elements of the offense, the defendant admitted to those elements as defined by the court, and yet the court ruled the plea lacked a factual basis.

The arbitrariness of the court's action is heightened because its insistence on an admission that the petitioner "specifically intended" to violate the statute put the petitioner in an intolerable Catch-22. By not making that admission, but limiting his admission to (in effect) a knowing, intentional violation as defined by the court, Morrison's plea would be rejected. But if he did make the admission, then that admission could be used against him if his appeal were successful and his case subsequently

retried. After all, as required by Rule 11(c)(5) of the Federal Rules of Criminal Procedure and as the court instructed the petitioner, whatever he said at the hearing was under oath and on the record, and false statements could expose him to perjury. An admission that he "specifically intended" to break the law (after he had already admitted to a knowing and volitional violation) would, at a minimum, expose him to serious impeachment if he obtained a retrial and took the stand to explain his actions. The Catch-22 imposed by the district court crossed the line of fundamental fairness and, thus, constituted a clear abuse of discretion. *See, e.g.*, *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983) (fundamental fairness precluded court from revoking probation for probationer's failure to pay a fine and restitution absent findings that he was responsible for the inability to pay and that alternative forms of punishment were not adequate to satisfy the State's interests); *Doyle v. Ohio*, 426 U.S. 610, 617-20 (1976) (it is fundamentally unfair and a violation of due process for the State to assure criminal suspect of his right to remain silent and then to use his silence to impeach him at trial); *In the Matter of the Complaint of Bankers Trust Company*, 752 F.2d 874, 890-91 (3rd Cir. 1984) (Catch-22 imposed by government violated fundamental fairness). As *Santobello* itself recognized, the validity of a trial court's action in the plea making and bargaining process "presupposes fairness."[6] That essential fairness was absent in this case.

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[6] In *Santobello*, that fairness was undercut by the conduct of the prosecutor's office, not, as here, by the conduct of the trial court. That distinction, however, has no significance in assessing the fairness of the process or the outcome.

The Fourth Circuit's decision to affirm put it in conflict with the decision of the Court of Appeals for the District of Columbia in *United States v. Washington*, 969 F.2d 1073 (1992). In that case, the defendant admitted to all the facts of the crime with which he was charged, but would not admit to facts that were in the indictment and that were external to the essential elements of the offense charged. The district court's refusal to accept the plea because of the defendant's refusal to admit to the external facts constituted an abuse of discretion; "the trial court focused on the words in the indictment rather than on the offense charged in the indictment." *Id.* at 1077. In this case, the district court inexplicably focused on the petitioner's failure to admit to a technical legal term that is *not* in the statute and completely ignored the petitioner's admission to the elements of the crime as the court itself had defined them.

## CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

| | |
|---|---|
| United States of America,<br>*Plaintiff-Appellee,*<br><br>v.<br><br>D. David Morrison,<br>*Defendant-Appellant.* | No. 01-4336 |

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston.
John T. Copenhaver, Jr., District Judge.
(CR-00-37)

Argued: December 6, 2001

Decided: February 7, 2002

Before WILKINSON, Chief Judge, and MICHAEL and TRAXLER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

## COUNSEL

**ARGUED:** James Byron Lees, Jr., HUNT & LEES, L.C., Charleston, West Virginia, for Appellant. Hunter P. Smith, Assistant United States Attorney, Charleston, West Virginia, for Appellee. **ON BRIEF:** Charles T. Miller, United States Attorney, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c)

## OPINION

PER CURIAM.

A grand jury in the Southern District of West Virginia charged C. David Morrison in a multi-count indictment with, *inter alia,* two charges of failing to account for and pay over taxes. *See* 26 U.S.C.A. § 7202 (West 1989). The district court rejected Morrison's conditional guilty plea, and the jury convicted Morrison on all counts. Morrison timely appealed, and we now affirm.*

I.

Morrison, a long-time CEO of Logan Medical Foundation, d/b/a Logan General Hospital, was charged with failing to account for and pay over federal income taxes and Federal Insurance Contribution Act taxes for employees of the hospital for the third and fourth quarters of 1997. Morrison did not contest that the taxes were owed and had not been paid, but he wanted to show that his desire to keep the hospital operational was a good motive for not paying them. Prior to trial, however, the prosecution filed a motion in limine to exclude any evidence of

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* Although Morrison was ultimately convicted on every count in the twenty-three count indictment, the bulk of Morrison's appeal relates to his conviction on the two tax counts. With regard to the balance of the charges, Morrison argues that the evidence was insufficient to sustain his conviction on those charges. We have reviewed the record and are satisfied that the evidence, when viewed in a light most favorable to the prosecution, supports the convictions. *See Glasser v. United States,* 315 U.S. 60, 80 (1942) ("The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it."). Thus, in the text of this opinion, we concern ourselves only with the facts and the law related to the two tax counts.

such a motive. At a hearing on the motion in limine, Morrison argued that "willfullness" in the context of § 7202 included "bad motive" as a component, and that the prosecution was therefore required to prove bad motive as an element of its case. Morrison further argued that he should be allowed to introduce evidence of his good motive to negate the bad motive element of the crime. The district court ruled that willfullness meant "a voluntary, intentional violation of a known legal duty," J.A. 191, and that the presence or absence of bad motive was irrelevant. Thus, the court concluded that Morrison's alleged good motive for failing to account for and pay over the taxes was likewise irrelevant, and the court accordingly granted the prosecution's motion in limine.

After the district court ruled adversely to Morrison on the motion in limine, Morrison attempted to enter a conditional guilty plea to the two tax charges, reserving only the right to challenge the district court's definition of willfullness. At the Rule 11 hearing on the proposed plea, the district court, consistent with its earlier ruling on the elements of willfulness, asked Morrison whether he knew he had a legal duty to pay the taxes and whether he had intentionally violated that duty. Morrison responded in the affirmative. The district court then asked Morrison whether he acted with the specific intent to violate the law when he failed to account for and pay over the taxes, and Morrison responded, "No, sir." J.A. 260.

After Morrison's negative response, the court indicated its unwillingness to accept the plea. The prosecution explained that its understanding was that the specific intent to violate the law was merely a restatement of the willfullness standard. The court, however, pointed out that "there must be some different understanding on the part

of the defendant." J.A. 261. The prosecution pressed the argument a little further, but its arguments failed to convince the court to take the plea.

Defense counsel eventually interceded but only made some ambiguous comments to the court about the events that had transpired. Counsel never asked the court to clarify its definition of specific intent or otherwise attempted to allay the court's concerns about Morrison's understanding of "specific intent" as the court was using that term. Rather, counsel again presented the court with statements about Morrison's alleged good motive for violating the law, at which time the court reiterated its earlier ruling on that point. Ultimately, the court was not satisfied that Morrison completely acknowledged his guilt to the charged offense, and it therefore refused to accept the conditional plea.

On appeal, Morrison claims that the district court erred in (1) its definition of "willfullness" for purposes of ruling on the motion in limine; (2) its rejection of his conditional guilty plea; and (3) its refusal to give a jury instruction on a good faith defense.

## II.

Morrison's first and third assignments of error need not detain us long. In ruling on the prosecution's motion in limine, the court defined willfullness as "a voluntary, intentional violation of a known legal duty." J.A. 191. That definition is squarely in line with the definition of willfullness the Supreme Court has declared applicable in the context of the criminal tax statutes. *See, e.g., Cheek v. United States,* 498 U.S. 192, 201 (1991) ("[W]illfullness [in the context of criminal tax statutes] simply means a

voluntary, intentional violation of a known legal duty."). Morrison's objection to the district court's definition, and consequently his objection to its ruling on the motion in limine, is premised on his belief that "bad motive" or "evil motive" is a separate and distinct element of willfullness. That, however, is not the case. *See id.* Although when discussing willfullness in *United States v. Bishop,* 412 U.S. 346, 360 (1973), the Supreme Court made reference to an evil motive, the Court made clear in *Cheek* that such reference was not intended to alter the definition of willfullness in any way. *See Cheek,* 498 U.S. at 201. Thus, the evil motive referred to in *Bishop* is nothing more than the intentional violation of a known legal duty. *See id.* Stated differently, evil motive is subsumed in the definition of willfullness.

Furthermore, with respect to Morrison's claim that the district court should have given an instruction on good faith, we note that the district court instructed the jury on the elements of willfullness and that, having done so, no additional instruction on good faith was necessary. *See id.* Thus, Morrison's first and third assignments of error are without merit.

III.

Morrison's final contention is that the district court erred in refusing to accept his conditional guilty plea. Rule 11(f) of the Federal Rules of Criminal Procedure provides that a district court "should not enter a judgment upon [a guilty] plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." Fed.R.Crim.P. 11(f). Furthermore, there is "no absolute right to have a guilty plea accepted," and a district court may "reject a

plea in [the] exercise of sound judicial discretion." *Santobello v. New York,* 404 U.S. 257, 262 (1971).

We cannot say that the district court abused its discretion in rejecting Morrison's conditional guilty plea. The plain language of Rule 11(f) directs a district court to make "such inquiry as shall satisfy it that there is a factual basis for the plea," and, in fact, declares that a court "should not enter a judgment upon such plea" until it has done so. In conducting the plea colloquy in this case, the court was simply complying with the dictates of the rule and attempting to satisfy itself that there was a sufficient basis for the plea. If there was any ambiguity or misunderstanding by the defendant about the court's use of the term "specific intent," it was incumbent upon the defendant or defense counsel to clear that up with the court and to satisfy the court that the defendant was voluntarily entering a knowing and intelligent guilty plea. At the end of the exchange between the court and defense counsel, the court offered defense counsel an opportunity to make any statement he wished. Counsel, however, did not take the opportunity, and the court was ultimately not satisfied that there was a sufficient basis for accepting the plea. On the record before us, we simply cannot say that the district court abused its discretion in rejecting the plea.

## IV.

Accordingly, the district court's rulings are affirmed in all respects.

*AFFIRMED.*

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | |
| v. | : | CRIMINAL NO. 2:00-00037 |
| C. DAVID MORRISON, DONALD G. CABELL, AMERICAN DEVELOPMENT CORPORATION, | : | NOVEMBER 15, 2000 |
| | : | VOLUME I |
| Defendants. | : | |

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE
JOHN T. COPENHAVER, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Charleston, WV 25375

These proceedings were reported with use of a stenographic machine and transcribed with use of computer-aided transcription.

* * *

[7] THE COURT: If not, the government has filed a motion in limine with respect to the first two counts of the indictment. The court agrees that the government's view of the law is correct in that willfulness for purposes of those two tax counts means a voluntary, intentional violation of a known legal duty, and the court accordingly so informs the parties so that you are prepared to argue the case or present it in that fashion.

* * *

[10] MR. SMITH [Assistant U.S. Attorney]: The point of our motion in limine, Your Honor, is to – was to prohibit the argument of the evidence that he failed to pay over the taxes because he had a better purpose for the money. The board suggests that Mr. Morrison is going to argue that by failing to pay the taxes to the United States, he saved jobs, he reduced infant mortality, he –

THE COURT: The court is not going to permit that evidence.

* * *

[20] THE COURT: The court adheres to its ruling that the matter which the defendant Morrison

would propose to offer as an excuse for paying these moneys out to others than the government, such as a commitment not to lay off employees, such as the chart shows that the Logan Medical Foundation was strapped for money, and as the charts also show that the hospital had to make up for massive revenue losses, that is not admissible as a basis for excusing the failure to pay in this instance. This is a crime that requires proof of intent, and the court has already stated it at the outset drawing on the language in the Pomponio case.

It also seems to the court that in determining whether that intent existed, that it is permissible to use the memorandum from which the quote was taken from the attorney Partain. That is not to say, however, that it's permissible to go beyond that and give reasons that are plainly not relevant to a determination of the question of whether or not the offense as set forth in counts one and two have been committed in this case.

* * *

[26] MR. LEES [Counsel for the defendant]: Very briefly, Your Honor. Abiding by the court's ruling now as to what the definition of criminal intent [27] is, let me just focus very quickly on the voluntariness. I would ask now for the permission of the court to use these documents and these exhibits as it goes to the issue now of voluntariness. If that is in fact the intent of the defendant, the position of the defendant would be that his payment of these various invoices was, in essence, not voluntary, that he had no choice but to pay these other bills. And I believe that these exhibits would be relevant to the issue of voluntariness which the court has said is at issue in this case. I would ask the court to

reconsider its ruling barring me from using these boards and the document from the board of directors vis-a-vis simply the issue of voluntariness and the actions of Mr. Morrison.

THE COURT: Mr. Smith.

MR. SMITH: Your Honor, our position hasn't changed. We have addressed what voluntariness means in this context in our pleadings. We have nothing more to say. Nothing has changed.

THE COURT: The court adheres to its prior ruling. The exhibits are not admissible with respect to counts one and two.

* * *

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | CRIMINAL NO. 2:00-00037 |
| v. | : | |
| C. DAVID MORRISON, | : | NOVEMBER 17, 2000 |
| Defendant. | : | |

TRANSCRIPT OF PLEA HEARING
BEFORE THE HONORABLE
JOHN T. COPENHAVER, JR.
UNITED STATES DISTRICT COURT

APPEARANCES:

| | |
|---|---|
| FOR THE UNITED STATES: | AUSA HUNTER P. SMITH, JR.<br>AUSA LARRY R. ELLIS<br>U.S. Attorney's Office<br>P.O. Box 1713<br>Charleston, WV 25336 |
| FOR THE DEFENDANT MORRISON: | JAMES B. LEES, JR.<br>Hunt & Lees<br>Post Office Box 2506<br>Charleston, WV 25329 |
| COURT REPORTER: | BARBARA STEINKE, RMR<br>Post Office Box 75025<br>Charleston, WV 25375 |

These proceedings were reported with use of a stenographic machine and transcribed with use of computer-aided transcription.

* * *

[45] [The Court:] Do I understand you to say that by indicating that you chose to pay other bills of your employer, that you were aware that there was an obligation to pay those taxes withheld, both income taxes and FICA taxes, to the Internal Revenue Service?

A. Yes, sir.

Q. And that was for the third quarter of the year 1997 –

A. Yes, sir.

Q. – in the approximate amount of 3.3 million dollars?

A. Yes, sir.

Q. And for the fourth quarter of 1997 in the approximate amount I believe of 1.2 million dollars?

A. Yes, sir.

Q. Now then, do I understand you to say as well that you were aware of your duty to pay those taxes so withheld for those two [46] quarters in those amounts over to the Internal Revenue Service?

A. Yes, sir.

* * *

Q. Now then, do I understand you to say then that you did voluntarily choose not to pay the Internal

Revenue Service the taxes for each the third and fourth quarters of 1997 that we talked about?

[47] A. Yes, sir.

Q. And do I understand you to say as well that that was on your part an intentional violation of a known legal duty to pay those taxes to the United States?

A. Yes, sir, as the court has defined the law, I realize that.

Q. Well, you can tell me. You knew you had the duty under the law to make the payment over, did you?

A. Yes, sir.

Q. And you chose not to do so?

A. Yes, sir.

Q. And in doing so, you specifically intended to violate the law?

A. No, sir.

THE COURT: Then if you did not specifically intend to violate the law, the court will not accept the plea.

MR. SMITH: Your Honor, may I address that point?

THE COURT: You may, but I must inform you, that that's the court's ruling, and unless the parties can meet it, unless you can make a factual basis for the plea on that basis, the court is not going to accept it.

MR. SMITH: The position of the United States and our argument has always been that the willfulness here was defined as the voluntary and intentional violation of a known legal duty, and to say that that requires a specific intent to violate the law is really simply restating what the precise definition [48] is, which is the willful – which is the voluntary, intentional violation of a known legal duty.

THE COURT: I point out there must be some different understanding on the part of the defendant.

MR. SMITH: The defendant has said in his own words that he voluntarily and intentionally violated a known legal duty. He has used those words, Your Honor, to this court today. He has said, "I voluntarily and intentionally violated a known legal duty." He has said that. He will say that again in those very words. He will not quibble or qualify any of those words.

The complicated matter here, Your Honor, is that the defendant has taken the position that he had a form of justification for that. Even though he voluntarily and intentionally violated a known legal duty, he has a justification. The United States has said and the court has ruled that justification was not – is not based in law and is not a defense to this charge.

It may be that it is simply the formulation of – the last formulation the court has used there, the specific intent to violate the law. That makes it very hard for him to agree as to his state of mind or perhaps as the elements of the offense. But the facts he gives, Your Honor, the facts for this factual basis are really unequivocal and, in our view, adequate to support the factual basis.

[49] I appreciate the court letting me say that. I understand the court's ruling.

THE COURT: The court draws upon the Pomponio case and notes, as it did heretofore, that the criminal intent is required, and in this case, it is that which the court has formulated. And if the defendant feels otherwise, then it seems to me the defendant is not interpreting this as the government is.

MR. SMITH: My understanding of Pomponio was when it went on to elaborate on the standard, that it was to say the only specific intent required is a specific intent to violate the known legal duty, and he has admitted that and that's why we thought that factual basis was adequate.

THE COURT: The mere fact that that is in the headnote is not persuasive. It seems to me one needs to read the case. The court has done so. That's the court's interpretation.

MR. SMITH: Thank you, Your Honor.

THE COURT: Anything further on the point?

MR. LEES: Just to make perfectly clear where the defendant is coming from. When you use the term "voluntary," I think the defendant would tell you that – or wanted to tell you and to tell the jury that he obviously knew that you are supposed to pay your taxes. He knows that is a legal duty. But on the issue of voluntariness, he also wanted to explain in this court the directions that he was given by his board. And the [50] court ruled – and that is why he very carefully is saying he does not want to dispute the court's ruling, he is abiding by it. The court ruled that the defendant's

exhibits as to the issue of the directives of the board, from the board as to what financial obligations to pay were not admissible on the issue of voluntariness. So we are very much attempting to abide by the court's ruling as to its ruling that that testimony and that evidence is not admissible on the issue of voluntariness. And given that definition by the court, the defendant has said exactly what Mr. Smith has represented.

THE COURT: Mr. Lees, I appreciate you wish to add to the record. The court had before it a single resolution. The resolution did not direct or require the defendant to do that which you have just related. Rather, it empowered him to do thus and so.

MR. LEES: I understand that.

THE COURT: That was the resolution that the court had before it.

MR. LEES: Yes, sir, I understand.

THE COURT: So it seems to me that the defendant needs to decide whether or not he wishes to make a factual basis for the plea. If he does, we'll proceed. Otherwise, the court is ready to proceed with trial.

MR. LEES: I think the defendant has answered your questions truthfully and completely as he can, and I think Mr. [51] Smith has correctly pointed out how he has answered those questions. And if the court is not satisfied based on those answers, we certainly will do as the court directs. But our intent here today, and I think Mr. Smith and I, our intent here today was to abide by the court's ruling and to not waste anyone's time in litigating an issue which we think has been resolved by the court.

THE COURT: I simply point out to the parties that the statement of the court to the elements, including specifically intending to violate the law, will be the basis on which the case will go to the jury. That language –

MR. LEES: That language.

THE COURT: – verbatim, specifically intending to violate the law, will be a part of the court's instructions, and the parties can count on it.

MR. LEES: All right.

THE COURT: Anything further?

MR. SMITH: Thank you, Your Honor.

MR. LEES: Thank you, Your Honor.

THE COURT: The court declines to accept the plea agreement and declines to approve the conditional plan.

* * *

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
March 12, 2002

No. 01-4336
CR-00-37-01

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

C. DAVID MORRISON

Defendant-Appellant

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ORDER

---

Appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

/s/ Patricia S. Connor
CLERK

Supreme Court, U.S.
FILED
AUG 9 2002

No. 01-1809

# In the Supreme Court of the United States

C. DAVID MORRISON, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether a taxpayer's motivation for failing to pay taxes is relevant to the offense of willfully failing to account for and pay over taxes, in violation of 26 U.S.C. 7202.

2. Whether the district court abused its discretion in declining to accept petitioner's conditional plea of guilty.

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# In the Supreme Court of the United States

No. 01-1809

C. DAVID MORRISON, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-6) is unpublished, but is available at 32 Fed. Appx. 669.

### JURISDICTION

The judgment of the court of appeals was entered on February 7, 2002. A petition for rehearing was denied on March 12, 2002 (Pet. App. 18). The petition for a writ of certiorari was filed on June 10, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the Southern District of West Virginia, petitioner was convicted on every count in a twenty-three count indictment, including two

counts of willfully failing to collect or truthfully account for and pay over employment taxes, in violation of 26 U.S.C. 7202. Pet. App. 2; Gov't C.A. Br. 2. He was sentenced to 97 months imprisonment, fined $15,000, and ordered to pay restitution of $692,318. Gov't C.A. Br. 3. The court of appeals affirmed. Pet. App. 1-6.

1. Petitioner was the Chief Executive Officer of Logan Medical Foundation, d/b/a Logan General Hospital. In that capacity, petitioner was responsible for determining which financial obligations of the hospital would be paid. The hospital, as an employer, was required to withhold federal taxes from its employees' wages. In the third quarter of 1997, the hospital failed to pay $3,316,864.18 in withheld employment taxes, and in the fourth quarter of 1997, the hospital failed to pay $1,226,352.96 in withheld taxes. A representative of the Internal Revenue Service informed petitioner that the hospital was required to pay the taxes. The taxes, however, remained unpaid when the hospital filed for bankruptcy protection in October 1998. Gov't C.A. Br. 3-4, 6-11.

2. Petitioner was charged, *inter alia*, with two counts of willfully failing to account for and pay over employment taxes. Petitioner did not dispute that the taxes were owed and not paid, but he sought to argue that his desire to maintain the hospital's operations by paying competing financial obligations presented a good motive for failing to pay over the withheld taxes. Before trial, the government filed a motion to exclude evidence of such a motive. The district court granted the government's motion, ruling that willfulness under 26 U.S.C. 7202 means the "voluntary, intentional violation of a known legal duty," and that the presence or absence of a bad motive is irrelevant. Pet. App. 2-3, 8-9.

Petitioner then attempted to enter a conditional guilty plea to the two tax counts, reserving the right to challenge the district court's ruling preventing the introduction of evidence concerning petitioner's motive. At the hearing on the proposed plea, the district court asked petitioner whether he was aware of his legal duty to pay the taxes and whether he had intentionally violated that duty. Petitioner answered in the affirmative. The district court then asked petitioner whether he acted with the specific intent to violate the law. Petitioner answered, "No, sir." When the district court indicated its unwillingness to accept the plea, the government explained its understanding that a specific intent to violate the law is equivalent to a voluntary and intentional violation of a known legal duty. The district court ruled, however, that "there must be some different understanding on the part of the defendant." Pet. App. 3-4, 12-15.

Petitioner's counsel did not ask the district court to clarify its definition of specific intent and did not attempt to address the court's concerns about petitioner's understanding of "specific intent." Counsel instead discussed petitioner's alleged good motive for violating the law, prompting the district court to reiterate its earlier ruling finding that evidence irrelevant. The district court refused to accept petitioner's guilty plea because the court was not satisfied that petitioner completely acknowledged his guilt. At trial, a jury found petitioner guilty on all counts. Pet. App. 2, 4, 15-17.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-6. The court first held that the district court's definition of willfulness was "squarely in line with the definition of willfulness [this] Court has declared applicable in the context of the criminal tax

statutes." *Id.* at 4 (citing *Cheek* v. *United States*, 498 U.S. 192, 201 (1991)). The court rejected petitioner's contention that "bad motive" is an element of willfulness. *Id.* at 5. The court explained that, although this Court's decision in *United States* v. *Bishop*, 412 U.S. 346, 360 (1973), referred to an evil motive, the Court subsequently made clear in *Cheek*, 498 U.S. at 201, that the motive referred to in *Bishop* was the intentional violation of a known legal duty. *Bishop* thus had not altered the Court's definition of "willfullness" as the voluntary, intentional violation of a known legal duty. Pet. App. 5.

The court of appeals also held (Pet. App. 6) that the district court had not abused its discretion in rejecting petitioner's conditional guilty plea. After noting that, under Federal Rule of Criminal Procedure 11(f), a district court must ensure that there is a factual basis for a guilty plea, the court of appeals observed that there is "no absolute right to have a guilty plea accepted" and that a district court may "reject a plea in [the] exercise of sound judicial discretion." Pet. App. 5-6 (quoting *Santobello* v. *New York*, 404 U.S. 257, 262 (1971)). The court explained that, here, to the extent that "there was any ambiguity or misunderstanding * * * about the [district] court's use of the term 'specific intent,'" it was petitioner's responsibility "to clear that up with the court and to satisfy the court that the defendant was voluntarily entering a knowing and intelligent guilty plea." Pet. App. 6. The court of appeals added that, although petitioner was given the opportunity to make a statement on the issue, he failed to take the opportunity. On that record, the court concluded, it could not find that the district court had abused its discretion.

## ARGUMENT

1. Petitioner asserts (Pet. 8-14) that the courts of appeals are divided on whether a taxpayer's ability to pay is relevant to the element of "willfullness" under 26 U.S.C. 7202. That contention is without merit.

This Court has defined "willfulness" in the context of the criminal tax statutes as a "voluntary, intentional violation of a known legal duty." *Cheek* v. *United States*, 498 U.S. 192, 201 (1991) (quoting *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976) (per curiam)); *United States v. Bishop*, 412 U.S. 346, 360 (1973). The element of willfulness, the Court has made clear, does not require a showing of bad purpose. *Cheek*, 498 U.S. at 200-201; *Pomponio*, 429 U.S. at 12. The Court explained in *Pomponio* that, although previous opinions had contained references to an "evil motive" or a lack of justification, "willful" under the federal tax statutes means a voluntary, intentional violation of a known legal duty, and there is no requirement of "any motive other than an intentional violation of a known legal duty." *Ibid.*; see *Cheek*, 498 U.S. at 201. Petitioner thus acted with the requisite "willfulness" when he voluntarily and intentionally failed to pay over withheld employment taxes despite knowledge of his legal obligation to do so.

In asserting that the courts of appeals are in conflict on the definition of willfulness, petitioner relies principally (Pet. 9) on *United States* v. *Poll*, 521 F.2d 329 (9th Cir. 1975). In *Poll*, the Ninth Circuit stated that,

> to establish willfulness the Government must establish * * * that at the time payment was due the taxpayer possessed sufficient funds to enable him to meet his obligation or that the lack of sufficient funds on such date was created by (or was the result

> of) a voluntary and intentional act without justification in view of all the financial circumstances of the taxpayer.

*Id.* at 333. That statement no longer represents the governing approach in the Ninth Circuit.

The Ninth Circuit decided *Poll* before this Court had made clear, in *Pomponio*, that the reference in previous decisions to an "evil motive" was not intended to suggest that willfulness "requires proof of any motive other than an intentional violation of a known legal duty." 429 U.S. at 12.[1] The Ninth Circuit has since come into line with this Court's decisions on this issue, holding that "[w]illfulness in the context of criminal tax cases is defined as a voluntary, intentional violation of a known legal duty" and "need not include bad faith or bad purpose." *United States* v. *Gilbert*, 266 F.3d 1180, 1185 (9th Cir. 2001) (quoting *United States* v. *Powell*, 955 F.2d 1206, 1210 (9th Cir. 1992)). In fact, the Ninth Circuit has rejected the argument advanced by petitioner here—*i.e.*, that a failure to pay taxes is excused or justified when a defendant, with knowledge that his actions are unlawful, voluntarily and intentionally uses available funds to pay other financial obligations. See *id.* at 1185.

The remaining decisions relied on by petitioner also do not establish a circuit conflict. See Pet. 9-10 (citing *United States* v. *Pinner*, 561 F.2d 1203, 1206 (5th Cir.

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[1] Petitioner asserts (Pet. 9 n.3) that this Court denied certiorari in *Poll* after it issued its decision in *Pomponio*. That is incorrect. The government did not file a petition for certiorari in *Poll* after the Ninth Circuit reversed Poll's conviction for willfully failing to account for and pay over taxes. The denial of certiorari cited by petitioner relates to Poll's subsequent retrial and conviction on a different charge.

1977), *United States* v. *Martin*, 507 F.2d 428, 430 (7th Cir. 1974), and *United States* v. *Rosenfield*, 469 F.2d 598, 601 (3d Cir. 1972), cert. denied, 411 U.S. 932 (1973)). Those decisions hold that there is no "willful" failure to file a tax return when the defendant's failure to file a return is based on an erroneous belief that the obligation extends only to individuals able to pay the tax. Here, however, petitioner knew about his legal duty to account for and pay over withheld employment taxes but voluntarily and knowingly decided not do so. Although, as petitioner observes (Pet. 13), *United States* v. *McGill*, 964 F.2d 222 (3d Cir.), cert. denied, 506 U.S. 1023 (1992), noted a "split of authority" on whether a taxpayer's ability to pay is relevant to the element of "willfulness," *id.* at 238-239 n.30, the only court of appeals decisions cited by *McGill* as evidencing a split are *Poll* and an earlier Ninth Circuit opinion, *United States* v. *Andros*, 484 F.2d 531, 533 (1973), which no longer state the governing standard in that court.[2]

Finally, petitioner errs in relying (Pet. 10-12) on the Child Support Recovery Act of 1992 (CSRA), 18 U.S.C. 228, which prescribes criminal penalties for willfully

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[2] Petitioner's reliance (Pet. 10) on *United States* v. *Harper*, 397 F. Supp. 983, 990 (E.D. Pa. 1975), and *United States* v. *Goodman*, 190 F. Supp. 847, 854-856 (N.D. Ill. 1961), is misplaced. In *Harper*, the district court concluded that the taxpayer could invoke his Fifth Amendment privilege against self-incrimination and refuse to provide information about his assets and income because evidence of his ability to pay taxes would indicate that his failure to pay was willful. In *Goodman*, the district court held that the government was required to prove that the defendant was financially able to pay his taxes, but that opinion predated this Court's decision in *Pomponio* and has been rejected by the courts of appeals. See *e.g.*, *United States* v. *Ausmus*, 774 F.2d 722, 725 (6th Cir. 1985); *United States* v. *Tucker*, 686 F.2d 230, 233 (5th Cir.), cert. denied, 459 U.S. 1071 (1982).

failing to pay child support. Even assuming that the definition of willfulness in the CSRA and in the criminal tax statutes is different, there is no conflict on the meaning of "willfulness" in the latter context.[3]

2. Petitioner also argues (Pet. 14) that the district court abused its discretion in refusing to accept his conditional guilty plea. That fact-bound contention lacks merit.

At the hearing on the proposed plea, petitioner admitted that he knew of his legal duty to pay the taxes and that he intentionally violated that duty. Pet. App. 3. But petitioner denied that he acted with the specific intent to violate the law. *Ibid.* Petitioner apparently responded in that manner based on a belief that an admission that he had a specific intent to violate the law was incompatible with the argument he wanted to preserve for appeal—that his motive of preserving the hospital's operations excused his failure to pay over the taxes.

Petitioner's denial that he acted with specific intent to violate the law contradicted his admission that he had intentionally violated a known legal duty. See *Cheek*, 498 U.S. at 200-201 (observing that "specific intent to violate the law [is] an element of certain federal criminal tax offenses" and holding that "the standard for the statutory willfulness requirement is the 'voluntary, intentional violation of a known legal

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[3] There is no merit to petitioner's argument (Pet. 12) that the governing standard for willfulness under the criminal tax statutes is "inconsistent with a fair system of taxation." Withheld employment taxes are held in trust for the United States. *Slodov* v. *United States*, 436 U.S. 238, 243 (1978). The federal tax statutes criminally prohibit the intentional use of those funds for alternate purposes in violation of a known legal duty to make payment to the United States.

duty'"). In addition, a good-faith belief that one's actions do not violate the tax laws negates the statutory element of willfulness. See *id.* at 202. As a result, when petitioner denied that he specifically intended to violate the law, he effectively denied an element of the offense. For those reasons, the district court acted within its discretion in refusing accept his conditional guilty plea.

Contrary to petitioner's assertion (Pet. 17), the court of appeals' decision does not conflict with the decision of the D.C. Circuit in *United States* v. *Washington*, 969 F.2d 1073, 1077 (1992), cert. denied, 507 U.S. 922 (1993). In *Washington*, the court of appeals held that the district court abused its discretion in rejecting the defendant's guilty plea based on his refusal to admit facts (the culpability of an accomplice) that were external to the elements of the charged offense. Here, the questions asked by the district court did not involve matters external to the elements of the offense. Instead, as explained, a "specific intent" to violate the law is equivalent to "willfulness" in this context, and petitioner's response called into question his admission to the elements of the offense.[4]

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[4] Petitioner errs in suggesting (Pet. 16) that his statements in the plea hearing could have been used against him in a retrial. If the district court had accepted petitioner's guilty plea and if he had been able to overturn his conviction on appeal, he would have been allowed to withdraw the plea. See Fed. R. Crim. P. 11(a)(2). In that event, his statements in the plea hearing generally could not have been used against him in a retrial. See Fed. R. Crim. P. 11(e)(6)(C)-(D).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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